

No. 47867-6-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

---

**STATE OF WASHINGTON,**

Respondent,

vs.

**ROBERT ALLEN KINNEY,**

Appellant.

---

Appeal from the Superior Court of Washington for Lewis County


---

**Respondent's Brief**

---

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney

By:

  
J. BRADLEY MEAGHER, WSBA No. 18685  
Chief Criminal Deputy Prosecuting Attorney

Lewis County Prosecutor's Office  
345 W. Main Street, 2nd Floor  
Chehalis, WA 98532-1900  
(360) 740-1240

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
I. FACTS.....	1
II. ARGUMENT .....	4
A. THE DEFENDANT HAS NOT MET HIS BURDEN TO PROVE A MANIFEST INJUSTICE .....	4
B. THE ALFORD PLEA WAS AN UNEQUIVOCAL PLEA ..	9
C. THE COURT MADE FINDINGS AS TO KINNEY'S ABILITY TO PAY HIS LFO'S THAT WENT BEYOND THE BOILERPLATE LANGUAGE IN THE JUDGMENT AND SENTENCE.....	9
III. CONCLUSION .....	10

## **TABLE OF AUTHORITIES**

### **Washington Supreme Court Cases**

<i>In Re the Matter of the Personal Restraint of Isadore</i> , 151 Wn.2d 294, 88 P.3d 390 (2004).....	5
<i>State v. Ross</i> , 129 Wn.2d 279, 916 P.2d 405 (1996) .....	5
<i>State v. Saas</i> , 118 Wn.2d 37, 820 P.2d 505 (1991) .....	5, 6
<i>State v. Taylor</i> , 83 Wn.2d 594, 521 P.2d 699 (1974) .....	5

### **Federal Cases**

<i>Boykin v. Alabama</i> , 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).....	5
<i>North Carolina v. Alford</i> , 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) .....	3, 4, 6, 9
<i>United States. V. Hernandez</i> , 203 F.3d 614 (9 <sup>th</sup> Cir. 2000) .....	7

### **Other Rules or Authorities**

CrR 4.2 .....	5, 6
---------------	------

## I. FACTS

The State adopts the Appellant's Procedural facts as outlined in Section 1 of his Statement of the Case, on pages 1 and 2 of the Appellant's Opening Brief. The State adds the following facts:

**On January 29, 2015**, the defendant's attorney, Mr. Don Blair, brought the defendant in front of the court because Mr. Kinney had indicated to Blair that he (Mr. Kinney) wanted to represent himself. 1/29 RP 8.<sup>1</sup> Kinney told the Court that Mr. Blair lied to him, and he wanted to represent himself. 1/29 RP 8-9. The court then engaged in an inquiry of the defendant in order to ascertain whether the defendant had the requisite knowledge to represent himself. 1/29 RP10. Specifically, the Court asked the defendant if he had any training in the law, if he knew anything about the rules of evidence, and if he knew how to pick a jury. 1/29 RP 10-11. To each question, the defendant answered in the negative. 1/29 RP 10-11. Then the Court made this statement:

**COURT:** And I don't think you're qualified to represent yourself. 1/29 RP 11.

**KINNEY:** I know I'm not, but I can't depend on him (referring to Mr. Blair). 1/29 RP 11.

---

<sup>1</sup> The record consists of multiple hearings and three different court reporters. Page numbers are not necessarily consecutive. I will refer to the record as follows: date (month/day), RP, page number of the transcript for that date. All dates were during the year 2015.

The Court then denied Mr. Kinney's request. 1/29 RP 11.

**On March 12, 2015**, Mr. Kinney again requested that he be allowed to represent himself. 3/12 RP 15. The Court granted that request and allowed him to represent himself. 3/12 RP 21. The last note on this particular 3/12 transcript indicates Blair was going to prepare an order withdrawing him as attorney for Kinney. 3/12 RP 21.

**On March 16, 2015**, Mr. Kinney was in court, representing himself. 3/16 RP 13. For some unknown reason, Blair was with Mr. Kinney notwithstanding Blair's removal as defense counsel four days earlier. 3/16 RP 13. Blair was actually referred to at the beginning of the hearing as "Mr. Kinney's former attorney." 3/16 RP 13. After an extensive colloquy with the defendant regarding the perils the defendant faces by acting as his own attorney, Mr. Kinney interrupted the court and said:

**KINNEY:** Excuse me. But if Don [Blair] will go ahead and represent me, I guess I'll let him go for it. 3/16 RP 32.

**On March 18, 2015**, at trial confirmation, Blair reported to the court that he and Kinney had met a couple of times and had spoken not only about the facts of the case, but about the fact that Kinney wanted to personally question witnesses. 3/18 RP 39. Once again, Kinney was contemplating self-representation, and the Court once

again explained to Kinney the perils of representing himself. 3/18 RP 39-RP 50. Mr. Kinney confirmed for trial. 3/18 RP 50. The Court then clarified Kinney's wishes regarding whether or not he wanted representation by asking Kinney:

**COURT:** With Mr. Blair as your attorney? 3/18 RP 50.

**KINNEY:** (Nods' head). 3/18 RP 50.

The State is assuming that Kinney's nod of the head was an affirmative "yes", in contrast to a shake of the head, which would have been a "no."

**The next day, on March 19, 2015**, the first day of trial, Kinney and Blair showed up for trial. Blair indicated to the court that he and Kinney had reviewed the reports, and that if the case were to proceed and the victim testified as indicated in the reports, Kinney would be found guilty of child molestation. 3/19 RP 77. Kinney then entered an *Alford* plea to an amended charge of child molestation in the first degree. 3/19 RP 78. (*North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)) At no time during that change of plea hearing did he ask to represent himself. 3/19 RP 77-93. In fact, the Court at one point asked Mr. Kinney:

**COURT:** Mr. Blair is your attorney today? 3/19 RP 81.

Kinney nodded his head in the affirmative, just as he had done the day before. 3/19 RP 81.

The Court gave Mr. Kinney a very detailed explanation of what an *Alford* Plea was, and what the consequences of Kinney's *Alford* Plea would be. 3/19 RP 78-80. The Court went over all of the defendant's rights and asked the defendant if he was waiving them. 3/19 RP 80-82. The defendant indicated he understood his rights. 3/19 RP 82. After the Court completed the colloquy regarding the guilty plea, the Court once again asked Kinney if he had any questions. 3/19 RP 87. Kinney said, "No." 3/19 RP 87. The court found Kinney guilty of child molestation in the first degree, pursuant to the *Alford* plea doctrine. 3/19 RP 88.

## **II. ARGUMENT**

### **A. THE DEFENDANT HAS NOT MET HIS BURDEN TO PROVE A MANIFEST INJUSTICE.**

From the outset, the Respondent/State would like the Court to note the fact that the Appellant, Mr. Kinney, has not challenged the sufficiency of the facts recited by the deputy prosecutor in support of the *Alford* plea. Nor has Kinney challenged the sufficiency of the charging information. The only challenge to the guilty plea is his mental state when he made the plea. Specifically, Mr. Kinney claims he did not make his plea knowingly, voluntarily and intelligently.

In order for a guilty plea to be valid, the defendant must make the plea knowingly, voluntarily and intelligently. *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996). The State bears the burden of proving the validity of a guilty plea, including the defendant's "[k]nowledge of the direct consequences" of the plea, which the State may prove from the record. *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996). A defendant, in contrast, bears the burden of proving "manifest injustice," defined as an injustice that is obvious, directly observable, overt, and not obscure. *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991) (quoting *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *In Re the Matter of the Personal Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). "A defendant need not be informed of all possible consequences of a plea but rather only direct consequences." *Ross*, 129 Wn.2d at 284. CrR 4.2 provides safeguards for guilty pleas. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea. CrR 4.2(d).



Applying these rules to Kinney's guilty plea, the Court was very careful to explain to Kinney just what an *Alford* plea was. 3/19 RP 78-79. At the end of the explanation, the Court asked Kinney if he understood it, and if he still wanted to enter the *Alford* plea. 3/19 RP 80. Kinney said he understood the *Alford* Plea. 3/19 RP 80. Immediately thereafter, Kinney said he wanted to enter the plea. 3/19 RP 80. Kinney has pointed to no irregularities in the taking of the plea pursuant to CrR 4.2.

The defendant has the burden of proving a manifest injustice. *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991). In Kinney's case, the only "injustice" claimed is that the defendant was not able to represent himself throughout his case. Appellant's Opening Brief, pages 15 & 23. But that assertion is factually incorrect and not supported by the record. Kinney was allowed to represent himself. 3/12 RP 21. But he changed his mind, and allowed Mr. Blair to be re-appointed to represent him at trial, which turned into a change of plea hearing. 3/19 RP 50 & 81. When Kinney changed his mind again, and wanted a new lawyer for a motion to withdraw his guilty plea, the Court granted his request and appointed the attorney of his (Kinney's) choosing. 5/18 RP 5.

This is factually different than the case relied upon by the Appellant on page 23 of his opening brief; that case being *United States V. Hernandez*, 203 F.3d 614 (9<sup>th</sup> Cir. 2000). *Hernandez's* case is distinguishable from Kinney's. In *Hernandez*, the 9<sup>th</sup> Circuit found that the District Court Judge was impatient with Mr. Hernandez. *United States V. Hernandez*, 203 F.3d 622 (9<sup>th</sup> Cir. 2000). The District Court Judge refused to give Hernandez the information necessary for Hernandez to make an intelligent decision regarding his right to counsel. *United States v. Hernandez*, 203 F.3d 622 (9<sup>th</sup> Cir. 2000). That judge also made a finding that Hernandez was incapable of putting on an effective defense. *United States v. Hernandez*, 203 F.3d 622 (9<sup>th</sup> Cir. 2000). Hernandez's request to represent himself was unequivocal. *United States v. Hernandez*, 203 F.3d 622 (9<sup>th</sup> Cir. 2000).

In stark contrast to the *Hernandez* case, both Judge Hunt and Judge Lawler inquired of Kinney, on two separate occasions, whether or not he had the requisite knowledge and experience to represent himself (Judge Hunt 1/29 RP 10, Judge Lawler RP 3/18 40). There was no finding that Kinney could not put on a defense, although Judge Hunt did agree with Kinney when Kinney commented that he (Kinney) was not qualified. 1/29 RP 11. Judge Lawler actually

granted Kinney's request, and allowed Kinney to represent himself.  
3/12 RP 21.

Judge Lawler also re-appointed Blair when Kinney asked him to. 3/16 RP 32. It is clear from the record that the reason Kinney maintained Blair as his counsel was that Judge Lawler very carefully told Kinney what the charge was, what the potential consequences of a guilty finding were, and what the dangers of self-representation were. 3/18 RP 40-50. Then, after the guilty plea was entered and the parties returned for sentencing and Kinney voiced his displeasure at what Blair had done for him, Kinney was granted his request for another attorney. 5/18 RP 5. He did not renew his request to represent himself.

Lastly, when the totality of the record is looked at, it is plain that Kinney's request to represent himself before he entered his guilty plea was equivocal in nature. He went back and forth; ultimately stating he was confused. 3/16 RP 32. Immediately after that statement, he interrupted the judge and asked to have Blair re-appointed as his attorney. 3/16 RP 32.

At every turn, the Court was careful to protect the defendant's rights, inform the defendant of the consequences of his decisions, and ultimately give the defendant what he wanted.

**B. THE *ALFORD* PLEA WAS AN UNEQUIVOCAL PLEA.**

Since Kinney was not deprived of his right to represent himself, and since this is the sole basis for the defendant's manifest injustice claim (Appellants Opening Brief, page 15) the *Alford* plea should be affirmed. Judge Brosey, a patient and experienced trial judge, carefully went over the change of plea form, in open court, with the defendant. 3/19 RP 79-92. All of Kinney's questions were answered. Kinney signed the change of plea form. 3/19 RP 87. At no time during the change of plea hearing did Kinney ask to, once again, represent himself.

**C. THE COURT MADE FINDINGS AS TO KINNEY'S ABILITY TO PAY HIS LFO'S THAT WENT BEYOND THE BOILERPLATE LANGUAGE IN THE JUDGMENT AND SENTENCE.**

The Court only ordered what can be regarded as minimal financial obligations. Appellant states in his opening brief that the Court imposed "thousands of dollars in discretionary costs". Appellant's Opening Brief, page 33. That is simply not true. The court only imposed a \$500.00 victim assessment, \$200.00 filing fee, \$100.00 DNA fee, and court appointed attorney fee in the amount of \$1,800.00. CP 88. The total was \$2,600.00.

Then the Court, having viewed Kinney personally in Court, found that Kinney was able bodied and had the ability to work and make periodic payments. 7/14 RP 54. The Court took into consideration the Social Security payments Kinney received, and set the periodic payment at only \$25 per month. 7/14 RP 55. So the court did make an independent finding based on the court's observations. Given Mr. Kinney's bad attitude and the fact he had previously been held in contempt (7/24 RP 42), it would have made little difference if the court had asked him any questions regarding his abilities.

### **III. CONCLUSION**

The defendant was allowed to represent himself, then changed his mind and his attorney was reappointed. When he expressed his wish for a new attorney, the court gave him one. The record is clear that the court did not deny him his right to represent himself. This fact completely undercuts the Appellant's argument. The entire claim of manifest injustice is based on the Appellant's assertion that Kinney was not allowed to represent himself. The record does not support that allegation. Kinney's appeal should be denied and the trial court affirmed.

The Court took into consideration Kinney's physical ability to work and set minimal legal financial obligations, and a minimal

monthly payment. Kinney's request to be relieved of his LFO's should be denied. In the alternative, if the court deems the record to be insufficient in this regard, the proper remedy is to send Kinney back to the Lewis County Superior Court for additional findings regarding Kinney's ability to work and pay his LFO's.

RESPECTFULLY submitted this 10 day of June, 2016.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney

by:   
J. BRADLEY MEAGHER, WSBA 18685  
Attorney for Plaintiff

**COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

ROBERT ALLEN KINNEY,

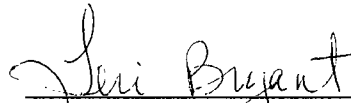
Appellant.

No. 47867-6-II

DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for J. Bradley Meagher, Chief Criminal Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On June 10, 2016, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Kathryn Russell Selk, attorney for appellant, at the following email address: [Karsdroit@aol.com](mailto:Karsdroit@aol.com).

DATED this 10<sup>th</sup> day of June, 2016, at Chehalis, Washington.



Teri Bryant, Paralegal  
Lewis County Prosecuting Attorney Office

## LEWIS COUNTY PROSECUTOR

**June 10, 2016 - 11:19 AM**

### Transmittal Letter

Document Uploaded: 7-478676-Respondent's Brief.pdf

Case Name:

Court of Appeals Case Number: 47867-6

**Is this a Personal Restraint Petition?** Yes ☐ No ☒

### The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

☒ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Teresa L Bryant - Email: [teri.bryant@lewiscountywa.gov](mailto:teri.bryant@lewiscountywa.gov)

A copy of this document has been emailed to the following addresses:

[Karsdroit@aol.com](mailto:Karsdroit@aol.com)